No. 06-132

IN THE

# Supreme Court of the United States

KEVIN AND JULIA ANDERSON, *et al.*,
*Petitioners,*

v.

DURHAM SCHOOL DEPARTMENT, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting As The Law Court**

## BRIEF IN OPPOSITION OF PRIVATE PARTY RESPONDENTS KEN WILLIAMS, *ET AL.*


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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| CONCLUSION | 10 |

# TABLE OF AUTHORITIES

CASES — Page

*Bob Jones University v. United States*, 461 U.S. 574 (1983) ..... 5

*Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) ..... 6

*Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004) ..... *passim*

*Locke v. Davey*, 540 U.S. 712 (2004) ..... *passim*

*Maher v. Roe*, 432 U.S. 464 (1977) ..... 7

*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) ... 1, 4, 5

*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) ... *passim*

STATUTES

20-A M.R.S.A. § 2951(2) ..... *passim*

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## BRIEF IN OPPOSITION OF PRIVATE PARTY RESPONDENTS KEN WILLIAMS, *ET AL.*

Respondents Ken Williams, *et al.*, defendants-intervenors in the court below, submit this Brief in Opposition to the Petition for a Writ of Certiorari.

## ARGUMENT

The petition for certiorari presents two questions, neither of which warrants review by this Court.

The first question concerns the proper application to this case of *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)—which, in petitioners' terms, "teaches" that when a legislature's "true reason" for enacting a statute is "known," other conceivable justifications for the statute cannot be relied upon to defend the statute against an Equal Protection Clause challenge. The question arises, according to petitioners,

because the "true reason" why the 1982 Maine Legislature initially adopted the challenged 20-A M.R.S.A. § 2951(2) prohibition on the public funding of tuition payments to religious private schools is "known"—*viz.*, compliance with the Establishment Clause—but the Maine Supreme Judicial Court nonetheless invoked other justifications in upholding § 2951(2) against petitioners' Equal Protection Clause challenge.

Petitioners' first question is not properly presented, because, as the Maine Supreme Judicial Court understood, this case does not turn on an Equal Protection Clause analysis of the 1982 Maine Legislature's action. Following the decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and in the light of *Zelman*'s Establishment Clause holding, the 2003 Maine Legislature acted to maintain § 2951(2)'s prohibition in force. And, it is Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition that gave rise to this lawsuit. The Equal Protection Clause analysis in this case thus centers on the rationality of Maine's post-*Zelman* decision to maintain § 2951(2)'s prohibition, and not on the rationality of the 1982 Legislature's adoption of that prohibition in the first place. *See infra* pp. 3-5.

The second question presented by petitioners is whether the Maine Supreme Judicial Court erred in ruling that Maine's use of public funds to pay for certain students to attend secular—but not religious—private schools passes constitutional muster. The court below did not err, and there is nothing about its ruling that warrants the exercise of this Court's certiorari power.

The Maine Supreme Judicial Court's ruling is not in conflict with the ruling of any other court; to the contrary, the decision below follows the lead decision of the First Circuit in *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), upholding the constitutionality of the § 2951(2) prohibition. And, both the *Eulitt* decision and the

decision below are firmly grounded in this Court's constitutional jurisprudence. *See infra* pp. 6-9.

For these reasons, which we develop below, the petition for certiorari should be denied.

## I.

Prior to 1982, Maine provided public funds to pay the tuition for certain students—specifically, those who resided in communities that did not operate their own public elementary and/or high schools—to attend secular or religious private schools. In 1982, in response to a 1980 Maine Attorney General's Opinion that the public funding of tuition for students to attend religious private schools was contrary to the Establishment Clause, the Maine Legislature enacted 20-A M.R.S.A. § 2951(2), which provides that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Pet. App. at 64.

In their Statement of Facts, petitioners discuss the 1980 Attorney General's Opinion and the action that the 1982 Maine Legislature took in response to that Opinion at length, and cite these events as the reason why Maine *currently* excludes religious private schools from its tuition payment program. But petitioners' Statement of Facts is less significant for what it says than for what it fails to say: nowhere in this 5-page segment of the petition do petitioners even mention the fact that lies at the heart of this case—specifically, the action taken by the 2003 Maine Legislature in response to this Court's decision in *Zelman v. Simmons-Harris*, *supra*.[1]

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[1] This action is mentioned by petitioners only in passing in their discussion of the trial court's decision in the "Proceedings Below" section of the petition. *See* Pet. at 7-8 & n.16.

In the immediate aftermath of *Zelman*—which held that an Ohio statute that provided public funding for tuition payments at both secular and religious private schools in Cleveland did not run afoul of the Establishment Clause—a bill was introduced in the 2003 Maine Legislature to repeal § 2951(2), and thereby permit public funding of tuition at religious private schools. That bill was brought to the floor of the Legislature. After a full and spirited debate in which a wide array of divergent viewpoints were expressed, the bill was defeated, *see* Pet. App. at 6, and the § 2951(2) prohibition was maintained.

Given the 2003 legislative events, the *Weinberger v. Wiesenfeld* question that petitioners present simply disappears from this case. Assuming *arguendo* that petitioners are correct in asserting that the "true reason" why the 1982 Maine Legislature initially enacted § 2951(2) is "known"—*viz.*, compliance with the Establishment Clause—petitioners' reliance on that fact is misplaced. The reason why the 1982 Maine Legislature did what it did some twenty-five years ago is *not* the reason why religious private schools are excluded from the state's tuition payment program today. Religious private schools are excluded today because the 2003 Maine Legislature—acting after this Court's decision in *Zelman*, and in the light of *Zelman*'s Establishment Clause holding—made an affirmative decision to maintain the § 2951(2) prohibition.[2]

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[2] We emphasize that the 2003 Maine Legislature did not simply allow § 2951(2)'s prohibition to remain in force after *Zelman*, but rather made an affirmative decision to maintain that prohibition—thus distinguishing the situation here from those situations in which mere legislative inaction properly is treated as inconsequential. As the trial court below aptly put it:

> Although the court recognizes that "unsuccessful attempts at legislation are [often] not the best of guides to legislative intent," there are in fact circumstances where legislative "nonaction is

Thus, the determinative legal question presented and decided first in *Eulitt v. Maine Department of Education, supra,* and then in this follow-up case, is whether Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools is proper under the Religion Clauses and the Equal Protection Clause of the Constitution. Why the 1982 Maine Legislature adopted the § 2951(2) prohibition in the first place does not bear on that question. While petitioners would have § 2951(2) viewed in a 1982 historical vacuum, the Maine Supreme Judicial Court correctly considered the statute's constitutionality on the full, ongoing legislative record.

In sum, because the 2003 Maine Legislature after *Zelman* chose to maintain the § 2951(2) prohibition, the outcome of this case does not turn on the Equal Protection Clause rationality of the 1982 Maine's Legislature's initial adoption of § 2951(2) more than twenty years before *Zelman.* That being so, the first question presented by petitioners respecting the proper methodology under *Weinberger v. Wiesenfeld* for making such an Equal Protection Clause rationality determination is not properly presented in this case, and is not fit for this Court's review.[3]

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> significant" and may be considered by a court seeking to discern intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). In situations where, as here, the Legislature has not simply declined to act or passively acquiesced in shifts in statutory application but has, instead, taken affirmative steps to reaffirm a statute's function and to articulate informed, purposeful reasons for doing so, a court should not discount such clear indicators of legislative intent. *See id.* [Pet. App. at 58 (bracketed language in original).]

[3] In reviewing the complete legislative history of § 2951(2), the court below expressly noted that the rational justifications supporting the 2003 Maine Legislature's action to maintain the prohibition are "not inconsistent with or contrary to" the asserted "actual rationale" for the 1982 Legislature's adoption of the prohibition, Pet. App. at 29, which we submit reflects a proper reading of *Weinberger v. Wiesenfeld.* And,

## II.

In *Eulitt v. Maine Department of Education, supra*, the First Circuit—taking full account of this Court's decisions in *Zelman* and *Locke v. Davey*, 540 U.S. 712 (2004)—ruled that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools passes constitutional muster. In the instant case, the Maine Supreme Judicial Court followed suit, ruling that "[a]fter *Zelman*, the State [of Maine] may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* [*v. Davey*] and *Eulitt* hold that [Maine] *is not compelled to do so*." Pet. App. at 31 (emphasis added).

These consistent reinforcing lower court decisions—and the absence of any even-arguably conflicting lower court decision—cut deeply against petitioners' contention that this Court's review is warranted here. And, petitioners' last-ditch argument in favor of such review—that the First Circuit and the Maine Supreme Judicial Court have in their respective decisions "taken [*Locke v. Davey*] out of [its factual] context," Pet. at 24, thus improperly "broadening [its] application," *id.* at 27—is totally without substance.

The First Circuit in *Eulitt* took the lead in rebutting petitioners' assertion that *Locke v. Davey* stands for nothing more than the proposition that a state may constitutionally "refu[se] to fund students training for religious vocations." Pet. at 24. And, the Maine Supreme Judicial Court followed

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petitioners' reliance on the Ninth Circuit's decision in *Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987), in an effort to bolster their first question presented is in any event misplaced. Unlike the situation in this case, the challenged policy in *Christian Science Reading Room* was not reconsidered and reaffirmed in the light of intervening legal developments under the Establishment Clause.

*Eulitt's* lead in its decision below. *See* Pet. App. at 6, 20-22, 26-27, 28, 31. For clarity's sake, we therefore outline the salient points made by the First Circuit, and seconded by the Maine Supreme Judicial Court, in this regard.

The *Eulitt* court began its constitutional analysis of the matter at hand by noting that, under *Locke v. Davey*, "the Free Exercise Clause provides the primary framework for assessing religious discrimination claims." 386 F.3d at 354. The *Eulitt* court added:

> *Davey* confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity. . . . The fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice. *Cf. Maher v. Roe*, 432 U.S. 464, 475-77 (1977) (explaining that the fundamental right to abortion does not entail a companion right to a state-financed abortion). [386 F.3d at 354-55.]

Thus, the *Eulitt* court continued, "[t]he appellants['] ['attempt'] to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries . . . is unpersuasive." 386 F.3d at 355. Rather, *Locke v. Davey* stands "more broadly" for the proposition that a state's decision to fund secular education and not to fund its religious education equivalents runs afoul of the Free Exercise Clause only if that decision "is motivated by religious animus." *Id.* The non-funding-of-religious-education decision that § 2951(2) embodies "passes that [Free Exercise Clause] test with flying colors," the *Eulitt* court held, inasmuch as § 2951(2) does not impose the kind of

burdens on religious adherents that would be suggestive of "anti-religious animus" on Maine's part. *Id.*[4]

From that predicate, the *Eulitt* court went on to hold that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools is subject to the normal Equal Protection Clause rational basis test, under which the burden lies with the challenger to "rule out every plausible rationale that might support the law at issue." 386 F.3d at 356.[5] And, the *Eulitt* court held that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition easily passes that test, inasmuch as it is supported by several such plausible rationales identified in the legislative history of the bill to repeal § 2951(2)—"includ[ing]," but not limited to, "Maine's interests in concentrating limited state funds on its goal of providing secular

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[4] "Maine's decision not to extend tuition funding to religious schools," the *Eulitt* court elaborated, "does not threaten any civil or criminal penalty. By the same token, it does not in any way inhibit political participation. Finally, it does not require residents to forgo religious convictions in order to receive the benefit offered by the state—a secular education." 386 F.3d at 355. The *Eulitt* court then added: "If more were needed—and we doubt that it is—*Davey* recognized that states are not required to go to the brink of what the Establishment Clause permits. . . . [Thus], the mere fact that a hypothetical program in which Maine extended tuition funding to parochial schools might comport with the Establishment Clause [under *Zelman*] would not support a presumption that religious hostility motivated [Maine's] decision not to adopt such a scheme." *Id.* at 355-56.

[5] Tellingly in this regard, there are no grounds for contending—and petitioners do not contend—that it is possible to discern from the legislative history of the bill to repeal § 2951(2) a single "true reason" for the 2003 Maine Legislature's decision to maintain § 2951(2)'s prohibition rather than repeal it. To the contrary, petitioners recognize, as they must, that the supporters of § 2951(2) offered a variety of explanations for maintaining the prohibition after *Zelman*. *See* Pet. at 8 & n.16. Individually, and certainly collectively, those explanations easily provide a rational basis for the 2003 Legislature's action.

education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities)." *Id.*

Echoing *Eulitt*, the Maine Supreme Judicial Court likewise held that "the State has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion." Pet. App. at 31.

Contrary to petitioners' assertion, it is thus clear that the constitutional rulings of the First Circuit in *Eulitt* and the Maine Supreme Judicial Court in the instant case are entirely in line with and faithful to this Court's constitutional jurisprudence.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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